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No. 061064 JAN 29 2007

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In The

Supreme Court of the United States

Frederick Feied,

Petitioner,

v.

The Regents of the University of California;
California Public Employees' Retirement System,

Respondents.

On Petition for Review
To The California Supreme Court[1]

PETITION FOR WRIT OF CERTIORARI

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[1] CA Supreme Court No. S146281
CA Ct. Of Appeal No. A112481
CA Superior Ct., Alameda County No. RG05212623

QUESTIONS PRESENTED FOR REVIEW

1. Must California's highest State Court yield to the Constitution and Laws of the United States with respect to the status of the REGENTS OF THE UNIVERSITY OF CALIFORNIA (hereinafter "REGENTS") as an "Arm of the State of California"?

2. Can REGENTS be both "an Arm of the State" and "Independent of the State" at the same time and with regard to the same administrative function?

3. Does the "Proprietary Functions Test" discern whether REGENTS is functioning as "an Arm of the State" or "Independent of the State" (i.e. "proprietary") with regard to the administrative function before the Court for review?

4. Does the existence of the "Proprietary Functions Test"establish that as a matter of law, REGENTS cannot be both "an Arm of the State" and "Independent of the State" at the same time and with regard to the same administrative function?

5. Can REGENTS enjoy immunity from suit in Federal Court under the Eleventh Amendment while at the same time enjoying exemption from the California Government Codes on the basis of its "constitutional independence from the State"?

6. Because of REGENTS' successful assertion of Eleventh Amendment immunity from suit in Federal Court with regard to the administration of its retirement program, must a retiree's period of employment with REGENTS be deemed a period of employment with the "State of

California" for the purposes entitlement to benefits?

7. Have the Federal Appellate Courts already established that REGENTS is considered "an Arm of the State" and entitled to Eleventh Amendment immunity with regard to the administration of its retirement program?

8. Can the State of California keep monies owed to a retiree and insulate itself from Judicial Review by disregarding established Federal authorities and the Supremacy Clause?

9. Does a State's highest Court's refusal to give a plaintiff his day in Court due to the Court's refusal to honor a State law exempting pension claims from any period of limitations result in abridgement of the First Amendment right to Petition for Redress of Grievances?

10. Does a State's highest Court's refusal to give a plaintiff his day in Court due to the Court's refusal to honor a State law exempting pension claims from any period of limitations result in abridgement of Fourteenth Amendment due process rights?

8. Does a State's highest Court's refusal to give a plaintiff his day in Court due to the Court's refusal to honor a State law exempting pension claims from any period of limitations result in an unconstitutional "Taking" where the State itself is keeping the plaintiffs' monies?

PARTIES

Petitioner, DR. FREDERICK FEIED (hereinafter "FEIED"), was the only plaintiff and appellant in the underlying proceedings.

Respondent, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (hereinafter "REGENTS"), was one of two defendants in the underlying proceedings.

Respondent, CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM (hereinafter "PERS"), was also a defendant in the underlying proceedings.

There are no other parties to this matter.

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JURISDICTION

The United States Supreme Court has Jurisdiction under U.S.C.A. Const. Art. III § 2, cl. 1 as all matters presented herein arise under the Constitution and Laws of the United States.

This petition is timely filed within 90 days of the date of the California Supreme Court's denial of Petitioner's Petition for Review. The California Court of Appeal entered its underlying opinion on July 24, 2006 (Cal. 1st. Dist. Court of Appeal Opinion dated July 24, 2006, p. 1, Appendix p.3)[2]. FEIED filed a timely Petition for Review with the California Supreme Court on September 1, 2006 (adx. 2), which was summarily denied on November 1, 2006 (California Supreme Court order filed Nov. 1, 2006 denying Pet. For Review, adx. 1).

CONSTITUTIONAL PROVISIONS

This matter involves the following Constitutional Provisions:

U.S.C.A. Const. Art. VI cl. 2 -
This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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All citations to the appendix shall hereinafter be preceded by "adx."

U.S.C.A. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S.C.A. Const. Amend. XIV -

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.C.A. Const. Amend. V -

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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STATEMENT OF THE CASE

FEIED qualified for retirement benefits under the State of California's PUBLIC EMPLOYEES' RETIREMENT SYSTEM by way of his years of employment as a professor for San Jose State University. FEIED also qualified for retirement benefits under REGENTS' separate retirement program, the UNIVERSITY OF CALIFORNIA RETIREMENT SYSTEM, by way of his years of employment with REGENTS. Initially both PERS and REGENTS denied FEIED his benefits, for which he sought administrative reviews. Approximately 12 years later PERS acknowledged its error and reinstated FEIED's benefits, though failing to pay FEIED the full amount of monies owed (Cal. 1st. Dist. Court of Appeal Opinion dated July 24, 2006, p. 1-2 adx. 5). REGENTS, on the other hand, refused to pay FEIED his benefits, raising the Statue of Limitations as a defense (Cal. 1st. Dist. Court of Appeal Opinion dated July 24, 2006, p. 2, adx. 7). FEIED filed three lawsuits thereafter, referenced herein as "FEIED I," FEIED II," and "FEIED III," described below. This petition arises in relation to "FEIED III," an action encompassing the Appellate Opinions in the earlier two actions.

FEIED I

State retirement pensions in California are not subject to any periods of limitations where there has been a deprivation due to an error or omission (California Government Code section 20164(b)(2), Cal. 1st. Dist. Court of Appeal Opinion dated March 2, 2004, footnote 2, adx. 51). Where the pension is to be paid by an agency

contracting with PERS (termed a "reciprocity"), the California Government Codes extend to the agency by statute, and no period of limitations applies to the claimant's claims against that contracting agency (California Government Code section 20353, quoted on Cal. 1st. Dist. Court of Appeal Opinion dated July 24, 2006, p. 5, - adx. 7). On this basis, FEIED filed suit against REGENTS and PERS in State Court in the year 2002 (hereinafter "FEIED I").

At the trial Court level, two judges apparently had differing views, but the final trial Court Judge applied a State statute of limitations and dismissed the action in its entirety. On March 2, 2004 the California Court of Appeal upheld the dismissal, inexplicably finding that California Government Code section 20164 was inapplicable as against PERS and REGENTS, and rejecting extension of § 20164 to REGENTS by virtue of its reciprocity with PERS, disregarding California Government Code section 20353 (Cal. 1st. Dist. Court of Appeal Opinion dated March 2, 2004, p.3, - adx. 7, 59-60). FEIED timely filed a Petition for Review with the California Supreme Court, which was summarily denied on June 9, 2004 (California Supreme Court order filed June 9, 2004 denying Pet. For Review, adx. 44).

FEIED II

Before filing "FEIED I", FEIED's counsels conducted an investigation to determine if the action should be filed in State or Federal Court, and observed that Federal authorities consistently found REGENTS to be "an arm of the State" so as to entitle it to immunity from suit in the Federal Court under the Eleventh Amendment. On this basis FEIED filed "FEIED I" in State Court.

However, the California Court of Appeal specifically found that the California Government Codes were inapplicable to REGENTS because of REGENTS' *independence and autonomy from the State of California* (Cal. 1st. Dist. Court of Appeal Opinion dated March 2, 2004, p.2, - adx. 50). On this basis it appeared that FEIED could now proceed with a Fifth Amendment "Taking" claim and other related constitutional claims against REGENTS in Federal Court, because the Eleventh Amendment would only bar a suit by a citizen of a state against his own "State," and a proprietary agency deemed to be "independent of the State" does not enjoy Eleventh Amendment immunity.[3] Feied therefore proceeded to file "FEIED II" on June 29, 2004, a Fifth Amendment Takings case which he filed in the Federal Court in San Francisco, CA. (Ninth Circuit Opinion dated June 20, 2006, p. 2, - adx. 40).

The Federal Court paused on the question of REGENTS' status as an "arm of the State" or as "independent of the State" and ordered additional briefing, but ultimately disagreed with the California Court of Appeal, as deduced from its ruling. Specifically, the Federal Court *correctly* observed that virtually every Federal appellate decision extended Eleventh Amendment immunity to REGENTS specifically on grounds that REGENTS was an "arm of the State," including with

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U.S. Const. Amendment XI initially only barred an action by a citizen of one state against another state in Federal Court. However, in the year 1890 in *Hans v. Louisiana* 134 U.S. 1, 10 S.Ct. 504 this Court modified the amendment, and ever since, the Eleventh Amendment was deemed to also bar an action by a citizen of a state against his own state.

administration of its retirement program, and dismissed the action.

The Federal Court articulated a second basis for dismissing the action. Specifically, the Court also found that FEIED's Fifth Amendment Takings claim was barred by a two-year statute of limitations (Ninth Circuit Opinion dated June 20, 2006, p. 3,-adx. 39). The Ninth Circuit Court of Appeals agreed and upheld the ruling (Ninth Circuit Opinion dated June 20, 2006, - adx. 39).

Eleventh Amendment immunity mean that whether the Ninth Circuit was right or wrong with regard to its conclusion that FEIED's Fifth Amendment claim was time-barred, FEIED could no longer pursue redress in Federal Court because REGENTS enjoyed Eleventh Amendment immunity from suit in the Federal Court forum.[4]

More importantly however, the Federal Court's and Nine Circuit's conclusion that REGENTS was "an Arm of the State" with regard to FEIED's pension claims established the basis for "FEIED III." Because REGENTS was an "arm of

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FEIED disagrees with the Ninth Circuit's conclusion that his Fifth amendment claims were time-barred. A "Taking" claim only ripens after denial by the State's highest Court. *Hacienda Valley v. City of Morgan Hill*, 353 F.3d 651. At the Federal Court juncture, once the Court determined that REGENTS was "an Arm of the State," FEIED was then required to adjudicate his claims against REGENTS in its capacity as "an Arm of the State," hence "FEIED III." FEIED believes his Fifth Amendment claims therefore ripened on November 1, 2006, upon the CA Supreme Court's denial of his Petition for Review. Nevertheless, at issue in this Petition is whether REGENTS is deemed "an Arm of the State" so as to bring it within the purview of California Government Code section 20164(b)(2) exempting FEIED's claims of retirement benefits owed from any period of limitations by *statute*.

the State" with regard to the administration of its own retirement benefits, FEIED's pension claims were exempted from any period of limitations by the very language of California Government Code section 20164(b)(2). Additionally, because REGENTS enjoyed a reciprocity with PERS, by the language of California Government Code section 20353 the statute exempting FEIED's pension claims from any period of limitations, § 20164, extended to REGENTS on this additional and independent *statutory* basis."

FEIED III

Once the Federal Court correctly established that with regard to the administration of its retirement benefits at issue, REGENTS was specifically an "arm of the State" and thus entitled to Eleventh Amendment immunity from suit in Federal Court, on July 1, 2005 FEIED filed a third lawsuit, "FEIED III," in State Court, this time premised on REGENTS' status as "an Arm of the State" and alleging:

1. The Federal Court already examined REGENTS' function in the administration of its retirement program and concluded that REGENTS was not engaged in a proprietary function, but rather was acting in its capacity as an "arm of the State of California" (Ninth Circuit Opinion dated June 20, 2006, p. 3, - adx. 41-42);

2. Because FEIED's years of employment with REGENTS must be deemed as years of employment with the State of California by way of the Federal Court's ruling, Ninth Circuit Opinion, and by way of logic, REGENTS cannot deny him retirement benefits by alleging that it is independent of the State of California

and not obligated to obey the California Government Codes; and

3. Injunctive relief was warranted and appropriate so as to mandate REGENTS' payment of FEIED's retirement benefits, particularly in light of the Federal Court's finding that REGENTS was an "arm of the State" with regard to the retirement matters at issue

FEIED lost "FEIED III," and appealed. This time FEIED specifically asked the California Court of Appeal to articulate on its decision whether REGENTS could be both an "arm of the State" and "independent of the State" at the same time and with regard to the same administrative function. Strangely, in affirming the lower Court's ruling, the California Court of Appeal not only failed to address the question of REGENTS' "state - nonstate" status, but it also inexplicably specified that in "FEIED I" it had specifically found that California Government Code section 20353 did not apply, thus the exemptions from any period of limitations as set forth in California Government Code section 20164 did not extend to REGENTS. The Court of Appeal did not provide any explanation for this conclusion, and the conclusion does not appear to be logical. Rather, the conclusion appears to disregard the language of § 20353 without explanation. FEIED therefore timely filed a Petition for Review with the California Supreme Court on September 1, 2006 (adx. 2), which was summarily denied on November 1, 2006 (adx. 1).

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STAGE OF PROCEEDING WHERE FEDERAL QUESTIONS WERE RAISED

It may be that FEIED's Federal claims arose in the course of the final appeal itself, rather than having been introduced in the complaint underlying appellate review in FEIED III, possibly presenting an additional question before this Court. In this instance it was the California Supreme Court (via the Court of Appeal) which was believed to have disregarded Federal law and the Supremacy Clause, therefore it is obvious that it would be futile for FEIED to pursue yet another State Court litigation and assert new constitutional claims, and predictable that the California Justices shall not respond favorably to such a filing. The question presented would therefore be whether a party may raise his constitutional claims against the State ab initio in the course of the State Court appeal and arising from dismissal of his lower Court complaint, or is the party required to pursue yet another action which on its face would prove futile and would predictably be met with strong disfavor by the State Court Justices. Discussion follows as to these matters.

FEIED initially raised Fifth and Fourteenth Amendment claims in *FEIED II*, his Federal Court action. However, once the Federal Court correctly concluded that REGENTS was "an Arm of the State" and therefore entitled to Eleventh Amendment immunity, FEIED raised his Fifth and Fourteenth Amendment claim in "FEIED III," on his appellate brief (Appellant's Opening Brief at pp.26, 31, 33, 34, CA 1st Dist. Court of Appeal, - adx. 16-19). In the course of the underlying appeal, Petitioner believes that the California Court of Appeal did not yield to Federal law and authorities, disregarded the Supremacy

Clause, and declined to address the reason it disregarded Federal authority on its opinion. The California Supreme Court upheld the ruling by denying a Petition for Review. FEIED now has two options - He can either return to the lower State Court and start all over again, this time arguing that the highest State Court has failed to yield to Federal authorities and the Supremacy Clause, or he can petition the U.S. Supreme Court on his Constitutional claims. Quite predictably, if FEIED were to return to State Court, the lower Court could not issue an order finding that the California Court of Appeal engaged in a constitutional violation, and the matter would inevitably go back to the Court of Appeal. The Justices of the Court of Appeal clearly were not pleased that FEIED returned once before, as evidenced by their comments on page 1 of its opinion dated July 24, 2006 (adx. 4). Thus, predictably, the Justices will not be pleased at all if FEIED returns yet a third time and accuses them of having disregarded the Constitution. The CA Supreme Court denied review twice, and also would predicably deny review a third time. It therefore seems proper and appropriate for FEIED to proceed with his only logical alternative, this Petition for Certiorari, and argue that the State's highest Court did not yield to Federal Authorities and the Supremacy Clause and seek relief which is only attainable at the U.S. Supreme Court level.

Concisely, the Federal claims arose on one of the following dates:

1. October 3, 2005 - the date the lower Court dismissed FEIED's claims and declined to follow Federal law and authority establishing REGENTS as "an Arm of the State" (Cal. 1st. Dist. Court of

Appeal Opinion dated July 24, 2006, - adx. 3);

2. July 24, 2006 - the date the California Court of Appeal issued its Opinion that FEIED could not pursue Judicial Redress of his claims, and declining to follow Federal law and authority establishing REGENTS as "an Arm of the State" (Cal. 1st. Dist. Court of Appeal Opinion dated July 24, 2006, - adx. 3); or

3. November 1, 2006 - the date the California Supreme Court denied the petition for review (California Supreme Court Petition for Review, adx. 1).

REASON FOR ALLOWANCE OF WRIT

The U.S. Supreme Court is the exclusive Judicial body empowered to uphold the Supremacy Clause. Here, if Petitioner is correct in his belief, then the State of California on the whole, along with its entire Judiciary System, has not yielded to Federal Authorities and Federal Law, because it continues to regard REGENTS as "Independent of the State" with regard to the administration of its retirement benefits, and as the *published* authorities reveal, also with regard to most or all of REGENTS' other functions. Most, if not all, of the published authorities in California, repeatedly find REGENTS to be exempted from laws applicable to the "State of California" as a union. On this basis, the California Judiciary has exempted REGENTS from having to pay retirement benefits to its employees under certain circumstances, whereas if those same employees were "State" employees, they would receive retirement

pensions.

Because no matter how one looks at the matter, so long as REGENTS is deemed "an Arm of the State" as established by Federal Authorities, indeed with respect to the very same issues and parties at issue, it appears that the California Judiciary *must* respect the Supremacy Clause and yield to Federal Authorities holding REGENTS to be "an Arm of the State." If Petitioner has not overlooked anything, then it appears the California Judiciary has thus far not been willing to yield to Federal Authorities establishing REGENTS as an "Arm of the State," thus disregarding the Supremacy Clause.

This writ should be allowed precisely for the same reasons articulated in *Mitchum v. Foster* (1972) 92 S.Ct.2151, which holds that the Federal Court is "interposed" between the states and the people,

> "...as guardians of the people's federal rights, and to protect the people from unconstitutional action under color of state law, whether that action be executive, legislative or judicial."

Interestingly the intent of Article III Clause 2 as expressed in *Mitchum* cannot be carried-through in Federal Court due to the Eleventh Amendment as modified in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890), and also due to the abstention doctrines (i.e. *Rooker-Feldman* and *Pullman*). The intent of these doctrines is to respect Federalism and the Sovereignty of the State Unions, calling for U.S. Supreme Court intervention only after all avenues of relief have been fully exhausted through the highest State Court level. Here FEIED has adhered perfectly, litigating his claims exhaustively through the

highest State Court level, therefore the U.S. Supreme Court's grant of this writ is fully proper and appropriate at this time.

RELIEF SOUGHT IN THIS COURT

U.S.C.A. Const. Art. VI cl. 2, which establishes that the Constitution and Laws of the United States "*shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby*" (*supra*). Under Federal law, REGENTS *must* be deemed as an "arm of the State" with regard to the administration of its retirement program, and has steadily been held as such in every Federal appellate decision. The State of California, whether by way of its independent agencies, Courts, or otherwise, cannot disregard these Federal authorities and declare REGENTS' status to the contrary, as "independent of the State" so as to permit REGENTS and its counter-part the State of California to keep the retirement pensions of FEIED and of all similarly-situated retirees. On these bases, FEIED seeks the following holdings from this Court, should his writ be allowed:

1. California's Highest State Court erred in concluding that FEIED's pension claims against REGENTS were not exempted from any period of limitations under California Government Code section 20164(b)(2). In *FEIED II* the Federal Court correctly found that REGENTS was "an Arm of the State," and in the related appeal, the Ninth Circuit further explained that in *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 838-839 (9th Cir.1997) it "*went on to hold that because the dispositive inquiry is California's legal liability for the Regents, 'the University is an arm of the State of California.*'" The

Ninth Circuit Court of Appeal has repeatedly held that the Regents are an arm of the state entitled to Eleventh Amendment immunity. *E.g., Armstrong v. Meyers,* 964 F.2d 948, 949-50 (9th Cir.1992); *Thompson v. City of L.A.,* 885 F.2d 1439, 1443 (9th Cir.1989); *BV Eng'g,* 858 F.2d at 1395; *Jackson v. Hayakawa,* 682 F.2d 1344, 1350 (9th Cir.1982). The State Court is bound by the Federal Court's conclusion, therefore California Government Code section 20164(b)(2) applies, and FEIED's pension claims are excluded from any period of limitations. Moreover, REGENTS also falls within the purview of § 20164 independently by virtue of its reciprocity with PERS pursuant to California Government Code section 20353.

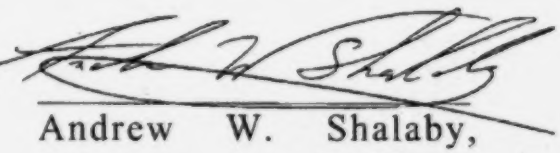
2. REGENTS cannot be both "an Arm of the State" and "Independent of the State" at the same time. The "Proprietary Functions Test" forecloses the existence of such a dual-status. *Owen v. City of Independence*, 445 U.S. 622,647, 100 S.Ct. 1398,1413 (1980).

3. REGENTS cannot enjoy immunity from suit in Federal Court under the Eleventh Amendment while at the same time enjoying an exception from California Government Code section 20164(b)(2). Because Eleventh Amendment immunity applies to REGENTS, specifically with regard to the administration of its retirement program as determined in "FEIED II," then FEIED's years of employment with REGENTS must be treated as years of employment with "the State," and thus California Government Code section 20164(b)(2) applies to exempt his action from any period of limitations.

4. The lower Court's dismissal of FEIED's claims abridge his First Amendment right to petition for redress.

5. The lower Court's dismissal of FEIED's claims deprive FEIED of his Fourteenth Amendment due process rights.

Dated: January 29, 2007



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